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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TIRECO, INC., Cross-complainant and Respondent, v. CHENGSHAN GROUP CO., LTD., et al., Cross-defendants and Appellants.	B212115 (Los Angeles County Super. Ct. No. BC365207)

APPEAL from an order of the Superior Court of Los Angeles County. Paul Gutman, Judge. Affirmed.

Fox Rothschild, Malcolm S. McNeil; Law Offices of Paul M. Ma and Paul M. Ma for Cross-defendant and Appellant Chengshan Group Co., Ltd.

Fulbright & Jaworski, James R. Evans, Jr., and Brandon C. Fernald for Cross-defendant and Appellant Cooper Tire & Rubber Company.

Margolis & Tisman, Mike Margolis and Timothy J. Martin for Cross-defendant and Appellant Cooper Chengshan (Shandong) Tire Company, Ltd.

Rutan & Tucker, Richard K. Howell, Steven J. Goon and Bradley A. Chapin for Cross-complainant and Respondent.

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Cross-defendants and appellants Chengshan Group Co., Ltd. (Chengshan Group), Cooper Tire & Rubber Company (Cooper Tire), and Cooper Chengshan (Shandong) Tire Company, Ltd. (Cooper Chengshan) (collectively appellants) appeal from the trial court's order denying their motions to compel arbitration of the issues raised by a cross-complaint filed by cross-complainant and respondent Tireco, Inc. (Tireco). After sustaining multiple evidentiary objections, the trial court ruled that appellants had failed to meet their burden to show the existence of a valid, enforceable and applicable arbitration agreement. We affirm. Substantial evidence supported the trial court's determination. Appellants submitted neither a certified translation of the foreign language agreement that contained the arbitration provision in accordance with California Rules of Court, rule 3.1110(g), nor offered a properly translated, verbatim recitation of the agreement's written provisions.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants are tire manufacturers, distributing tires and accessories through wholesaler Tireco.

In January 2007, Tireco filed a complaint against Aguirre Enterprises and others (collectively Aguirre) alleging causes of action for breach of contract, open book account, account stated and breach of guaranty. Tireco sought recovery of $2,195,713.60 that Aguirre allegedly failed to pay for the purchase of tires and related products. Aguirre answered in March 2007, generally denying the allegations and asserting multiple affirmative defenses. In May 2007, Aguirre cross-complained against Tireco, alleging claims for breach of warranties, breach of contract and breach of the implied covenant of good faith and fair dealing. Aguirre alleged that the Freestar truck tires it had purchased from Tireco between approximately March 2005 to December 2005 were defective. Though Tireco allegedly represented that the defects had been remedied in the fall of

2005, a subsequent order contained similarly defective tires. Tireco declined to replace the defective tires, thus requiring Aguirre to spend sums on replacements. Tireco generally denied the cross-complaint's allegations and raised several affirmative defenses.

In June 2007, Tireco filed a cross-complaint against appellants, manufacturers of the allegedly defective Tireco tires. Tireco alleged causes of action for equitable and contractual indemnity, declaratory relief, contribution and breach of express and implied warranties. Appellants answered and filed separate motions to stay the proceedings and compel arbitration. All motions to compel were premised on a May 17, 2002 Exclusive Agency Agreement (EAA) between Tireco and Rongcheng Rubber Factory (an alleged predecessor to the Chengshan Group), Shandong Chengshan Tire Company Limited by Shares and Rongcheng Guotai Tire Co., Ltd. (collectively the Rongcheng entities). In support of the motions, appellants' attorneys submitted declarations to which they attached what they represented was an accurate copy of the EAA and an English translation thereof. Attorney Paul Ma submitted a declaration on behalf of the Chengshan Group; attorney Brandon Fernald submitted a declaration on behalf of Cooper Tire; and attorney Timothy Martin submitted a declaration on behalf of Cooper Chengshan.

The EAA attached to the declarations was written entirely in Chinese. According to a three-page English translation of the EAA's recitals, Tireco was designated as the Rongcheng entities' exclusive agent for the sale of tires and related accessories in the countries and territory under the North American Free Trade Agreement. In pertinent part, the translation also stated: "**Arbitration**. All of the disputes arising from the performance of or in connection with this Agreement shall be resolved through consultations between the Parties. In case of the failure of the consultation, such dispute shall be submitted to Beijing Branch of China International Economic and Trade Arbitration Commission ('CIETAC') for arbitration. The arbitration shall be conducted in accordance with the arbitration rules of CIETAC and the PRC Contract Law. The

arbitration award shall be final and binding on both Parties. Except as otherwise provided, the arbitration fees shall be borne by the losing Party."

The translation further provided: "The designation under this Exclusive Agency Agreement shall be initially effective for 3 years." At the conclusion of the three-year period, the Rongcheng entities were entitled to terminate the agreement if Tireco's order volume did not meet specified amounts. Correspondingly, "[i]n case of the fulfillment of the minimum prescribed amount, this Agreement shall be automatically extended for a new three-year term." Finally, the translation stated: "Upon expiration of the three-year agreement term, the Parties shall consult and determine the details of annual sales volume."

Tireco and Aguirre opposed the motions to compel arbitration. Tireco asserted that appellants failed to meet their burden to show the existence of a valid, enforceable and applicable arbitration agreement. More specifically, it asserted that there was no properly translated version of the EAA before the court, that the Rongcheng entities were not parties to the cross-complaint and that the EAA had expired before the facts giving rise to the cross-complaint occurred. It submitted several declarations and exhibits in support of its opposition. Included among that evidence were declarations from Tireco executives who averred that the parties did not renew the EAA and it expired on its own terms in May 2005. It also attached a declaration from engineer Gary Bolden, who inspected tires produced by Aguirre and determined that only one of 601 tires had been manufactured prior to May 17, 2005. Tireco also filed evidentiary objections to the attorney declarations submitted by appellants in support of their motions.

In reply, appellants submitted declarations and exhibits to show that the parties to the cross-complaint and the EAA were the same; their evidence was designed to show that in October 2005 Cooper Chengshan entered into an asset purchase agreement with one of the Rongcheng entities and another of the Rongcheng entities changed its name to the Chengshan Group. It also offered evidence to show that notwithstanding the expiration of the EAA, the parties thereafter continued to enter into sales contracts and purchase orders which contained the same arbitration clause as provided in the EAA.

Tireco filed additional evidentiary objections to the reply declarations. With the trial court's permission, Tireco submitted a surreply together with a supplemental declaration from Victor Li, Tireco's director of sales and marketing, who averred that Tireco had never received a document similar to the sales contracts and purchase orders attached to appellants' reply. Appellants, in turn, offered a supplemental declaration by Hong Zhi Che, the Chengshan Group's chairman of the board, stating that the attached sales contracts and purchase orders were executed in through Tireco's office in China.

Ultimately, the parties entered into a limited stipulation, agreeing to the accuracy of the English translation of the EAA that was attached to Tireco's opposition papers. On October 14, 2008, following two separate hearings, the trial court issued a written ruling denying the motions to compel arbitration. In large part, the ruling addressed Tireco's evidentiary objections to the declarations submitted by attorneys Ma, Fernald and Martin. The trial court sustained all evidentiary objections in their entirety. In light of its rulings on the evidentiary matters, the trial court concluded that appellants failed to meet their burden to establish by a preponderance of the evidence the existence of a valid, enforceable and applicable arbitration agreement.

Appellants appealed. Thereafter, Cooper Chengshan sought judicial notice of several documents related to subsequent CIETAC proceedings. We grant Cooper Chengshan's motion to take judicial notice of an arbitral award issued by the CIETAC in March 2009, Exhibits A-1 and A-2 to its motion. In all other respects, we deny the motion. According to the award—which was rendered after the trial court's ruling in this matter—on the basis of testimony, documents and argument offered before the CIETAC tribunal, the CIETAC ruled that the EAA's arbitration clause was valid and effective, though it deemed the EAA to have terminated on May 17, 2005 at the expiration of its three-year term.

DISCUSSION

Appellants contend they satisfied their burden to show the existence of an agreement to arbitrate the claims raised in the cross-complaint, thus mandating the trial

court to order that the controversy be arbitrated. (Code Civ. Proc., § 1281.2.) In moving to compel arbitration, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (*Engalla*).) Where, as here, the court has considered extrinsic evidence and made factual determinations in concluding that the parties moving to compel arbitration failed to meet their burden, we apply the substantial evidence standard of review. (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 953; *Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701; *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357.) We review the trial court's rulings on evidentiary objections under the abuse of discretion standard. (E.g., *People v. Waidla* (2000) 22 Cal.4th 690, 717; *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

I. General Arbitration Principles.

Code of Civil Procedure sections 1281.2 and 1290.2 provide for the resolution of motions to compel arbitration in summary proceedings. (*Engalla, supra,* 15 Cal.4th at p. 972.) According to these statutes, motions to compel arbitration are determined in the trial court in the manner provided for hearing motions generally. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*); *Brown v. Wells Fargo Bank, N.A., supra,* 168 Cal.App.4th at p. 953.) Facts are proven by affidavit or declaration and documentary evidence, with oral testimony taken in the trial court's discretion. (*Rosenthal, supra,* pp. 413–414; *Brown v. Wells Fargo Bank, N.A., supra,* at p. 953.)

The Supreme Court has described the shifting burdens on the motion as follows: "[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory

prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. [Citation.]" (*Rosenthal, supra*, 14 Cal.4th at p. 413; accord, *Engalla, supra*, 15 Cal.4th at p. 972.) In other words, if the party seeking to compel arbitration satisfies its initial burden of proving the existence of a valid agreement to arbitrate, the burden then falls on the party opposing arbitration to show the agreement cannot be interpreted to apply to the dispute. (*Balandran v. Labor Ready, Inc.* (2004) 124 Cal.App.4th 1522, 1527; *Buckhorn v. St. Jude Heritage Medical Group* (2004) 121 Cal.App.4th 1401, 1406.)

II. Substantial Evidence Supported the Trial Court's Determination that Appellants Did Not Meet Their Initial Burden to Show the Existence of a Valid Agreement to Arbitrate.

The trial court ruled that appellants failed to meet their threshold burden to show the existence of a valid, enforceable and applicable agreement to arbitrate. It reached this conclusion following its sustaining each and all of Tireco's objections to the attorney declarations which purported to attach "true and accurate" copies of the Chinese language EAA, as well as "true and accurate" copies of English translations thereof.

Appellant Cooper Chengshan has not challenged the trial court's evidentiary rulings on appeal. "As a result, any issues concerning the correctness of the trial court's evidentiary rulings have been waived. [Citations.] We therefore consider all such evidence to have been properly excluded." (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014–1015.) Correspondingly, appellants the Chengshan Group and Cooper Tire (by joining in the Chengshan Group's arguments) have challenged the rulings only on the ground of lack of authentication. But the trial court sustained objections on the additional and independent grounds of lack of foundation and hearsay. Because appellants failed to challenge the additional grounds on which the trial court relied in excluding the declarations, we likewise find that any issue as to the correctness of the rulings on those

grounds has been waived. (E.g., *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 278 [“‘In a challenge to a judgment, it is incumbent upon an appellant to present argument and authority on each point made. Arguments not presented will generally not receive consideration’”]; see *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545, 546 [Court of Appeal’s role is neither to search the record on behalf of appellants nor to serve as “backup appellate counsel”].) Notwithstanding appellants’ waiver of the issue, we note that the trial court acted well within its discretion in sustaining the objections, particularly on the ground of hearsay. (See *Cullincini v. Deming* (1975) 53 Cal.App.3d 908, 915 [counsel’s declaration stating that the plaintiff was a secured creditor properly disregarded as inadmissible hearsay because counsel was not a party to the agreement in dispute and such information was not shown to be within counsel’s personal knowledge].)

Exclusion of the attorney declarations and their attachments, however, is not completely dispositive of the question of whether appellants met their burden to show the existence of an applicable agreement to arbitrate. In particular, California Rules of Court, rule 3.1330[1] states: “A petition to compel arbitration or to stay proceedings pursuant to Code of Civil Procedure sections 1281.2 and 1281.4 must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be attached to the petition and incorporated by reference.” (See also *Condee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, 219 [“Rule 371 [predecessor to rule 3.1330] does not require the petitioner to introduce the agreement into evidence or provide the court with anything more than a copy or recitation of its terms”]; accord, *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 764–765 [party

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1 Unless otherwise indicated, all further rule citations are to the California Rules of Court.

moving to compel arbitration meets its initial burden to show the existence of an agreement to arbitrate by complying with the California Rules of Court].)

Exclusion of the attorney declarations precluded appellants from satisfying the portion of rule 3.1330 that requires the arbitration agreement be attached to the motion to compel. Nor did appellants comply with the alternative means of satisfying their burden under rule 3.1330, as they quoted verbatim only the English translation of the paragraph of the EAA that directed the parties to arbitrate their disputes that arose from the performance of or were in connection with the EAA. None of the motions to compel quoted verbatim "the provisions of the written agreement" as required by rule 3.1330. Quoting the arbitration paragraph, alone, was insufficient to satisfy appellants' burden to establish "prima facie evidence of a written agreement to arbitrate the controversy," as the motions to compel failed to show whether the controversy alleged in the cross-complaint was the subject of the EAA. (*Rosenthal, supra,* 14 Cal.4th at p. 413.)

Appellants' omission is compounded by the fact that the proffered EAA and its English translation failed to satisfy a separate provision of the California Rules of Court that specifically governs exhibits written in a foreign language. Rule 3.1110, which governs the general format of motions, provides in subdivision (g): "Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter."[2] The record reveals that neither the stricken declarations nor the English translations themselves indicated that the translations were certified under oath by a qualified interpreter. Thus, the requirements of the operative rule were not met.

Appellants rely heavily on *Condee v. Longwood Management Corp*., *supra,* 88 Cal.App.4th 215, where the court held that an agreement to arbitrate need not be authenticated in order for the party moving to compel arbitration to demonstrate its existence. The court explained: "For purposes of a petition to compel arbitration, it is not necessary to follow the normal procedures of document authentication. . . . The

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[2] We note that Cooper Chengshan complied with rule 3.1110(g) in connection with its request for judicial notice by attaching the Chinese language CIETAC arbitral award and a certified English translation thereof by a qualified interpreter.

statute [Code of Civil Procedure section 1281.2] does not require the petitioner to introduce the agreement into evidence. A plain reading of the statute indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity." (*Id.* at pp. 218–219.) Here, however, appellants' failure went beyond a lack of authentication. Rather, appellants failed to meet their threshold burden of establishing the existence of a valid agreement to arbitrate.

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence." (*Rosenthal, supra*, 14 Cal.4th at p. 413.) Because the trial court had no evidence of either a copy of an applicable agreement to arbitrate or a verbatim recitation of the agreement's provisions, it was entitled to conclude that appellants did not meet their burden of establishing the existence of a valid arbitration agreement. (See *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230 [observing that moving party's failure to establish by a preponderance of the evidence that an arbitration agreement existed would have been a valid basis, alone, for denial of a petition to compel arbitration].) Absent compliance with rule 3.1330 and 3.1110, appellants failed to present "prima facie evidence of a written agreement to arbitrate the controversy."[3] (*Rosenthal, supra*, at p. 413.) Substantial evidence supported the trial court's denial of appellants' motions to compel arbitration.

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[3] In view of our conclusion that appellants did not meet their initial burden, there is no need to address Tireco's defenses to enforcement of the EAA's arbitration provision.

DISPOSITION

The order denying appellants' motions to compel arbitration is affirmed. Tireco is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ